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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. TRACY ALLEN MONTANO, Defendant and Appellant.	B267465 (Los Angeles County Super. Ct. No. VA136210)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lori Ann Fournier, Judge. Affirmed.

Karyn H. Bucur, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey and Esther P. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

Tracy Allen Montano appeals the trial court's denial of his motion for specific enforcement of a 1999 plea agreement. Facing a life sentence on a third strike, Montano argued his previous plea agreement included a promise by the prosecutor that his 1999 conviction would never count as a second strike offense. We affirm the judgment.

FACTS

In 1999, Montano's then-girlfriend reported he choked her, threw her to the floor, and threatened to kill her with a knife. Montano was charged with criminal threats in violation of Penal Code[1] section 422 with further allegations that he personally used a deadly and dangerous weapon during the commission of the offense, had suffered one prior strike for first degree burglary, and had served two prior prison terms. (§§ 667, subds. (b)-(i), 667.5, subd. (b), 1170.12, subds. (a)-(d), 12022, subd. (b)(1).) In 1999, criminal threats under section 422 was not a serious felony within the meaning of the "Three Strikes" law. However, section 1192.7 designated "any felony in which the defendant personally used a dangerous or deadly weapon" to be a serious felony. (§ 1192.7, subd. (c)(23).) Thus, the charge that Montano made criminal threats with the additional allegation that he personally used a knife during the commission of the offense qualified as a "strike." Montano pled no contest to making criminal threats and served two years in state prison. The remaining allegations, including the deadly weapon enhancement allegation, were stricken. Thus, Montano avoided adding a second strike to his sentence in the 1999 case.

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[1] All further section references are to the Penal Code unless otherwise specified.

In 2000, the voters approved Proposition 21, an initiative measure known as the Gang Violence and Juvenile Crime Prevention Act of 1998. (*People v. James* (2001) 91 Cal.App.4th 1147, 1149.) Proposition 21 amended section 1192.7 by adding, among other crimes, criminal threats to the list of "serious felonies" enumerated in that section. (§ 1192.7, subd. (c)(38).) Proposition 21 became effective on March 8, 2000. (*People v. James*, at p. 1149.)

In 2014, an information filed in case number VA136844, Montano was charged with one count of burglary in violation of section 459. It alleged he entered a detached garage on June 26, 2014. In a separate information filed in case number VA136210, Montano was charged with residential burglary (count 1; § 459), receiving stolen property (count 2; § 496, subd. (b)), and possession of ammunition by a felon (count 3; § 30305, subd. (a)(1)). As to count 1, it was further alleged Montano had suffered two prior convictions pursuant to section 667, subdivision (a)(1). As to counts 1, 3, and 4, it was alleged he had suffered two prior convictions of a serious felony or a violent felony. (§§ 667, subd. (d), 667.5, subd. (c), 1170, subd. (h)(3), 1192.7.) It was also alleged he suffered numerous prior convictions. (§ 667.5, subd. (b).) The two matters were consolidated under case number VA136210 and the trial court ordered that information amended to add the burglary of the detached garage as count 4.

At the time of his plea in 1999, Montano had already suffered a 1992 residential burglary conviction, which qualified as a strike under the Three Strikes law. Because Proposition 21 made criminal threats a serious felony for purposes of the Three Strikes law, by the time of his current plea in 2015, his 1999

conviction counted as a second strike. As a result, Montano faced a life sentence in case number VA136210.

On July 8, 2015, Montano moved for specific enforcement of the 1999 plea agreement, arguing, "[t]he clear intent of the parties to Defendant Montano's 1999 plea agreement was that the conviction would not be used as a future sentencing enhancement under the Three Strikes law." Montano contended the district attorney offered the plea agreement after he learned the victim, Montano's then-girlfriend, would recant her claim that Montano used a knife to threaten her.

In support of his motion, Montano submitted his own declaration explaining, "At the time of my plea in 1999, I was aware that I already had one conviction on my record which would constitute a 'strike' prior and my primary concern in resolving case number VA052851 was to avoid a second 'strike' conviction. Although I did not commit the offense charged, I decided to plead 'No Contest' because of the District Attorney's promise that the conviction would not qualify as a 'strike' offense and that the District Attorney's Office would not use the conviction to enhance any future sentences pursuant to the Three Strikes law. Without the assurance that the conviction would not qualify as a 'strike,' I would not have waived my constitutional rights and would not have entered a plea of 'No Contest.' " Montano also submitted a photocopy of his trial counsel's handwritten notes from that time. On a page dated March 16, 1999, counsel wrote, "D.A. advised and offers [Defendant] 2 years w/o strike. Says will not dismiss and will proceed to trial by impeaching victim. [Defendant] accepts."

Montano's motion was heard on September 24, 2015, and denied. The trial court found "[no]thing in the record that shows that there was an implied agreement of any kind or that it could be read as that. And that the court's ruling was that the general California laws that the plea agreement deems to incorporate and contemplate not only existing law but the reserved power of the state to amend the law or enact additional laws for the public good and pursuant to public policy. That the parties enter[ed] into a plea agreement does not have the affect of insulating them from changes in the law that the legislature has intended to apply to them . . ." Montano subsequently pled no contest to the four counts alleged in case number VA136210 and admitted the prior strikes.[2] In a sentencing memorandum, he urged the trial court to dismiss both of his prior strikes in the interest of justice under section 1385. The trial court agreed to strike Montano's first strike under section 1385 in calculating the base term for count 1, but not his second strike, which is the subject of this appeal. Montano was sentenced to state prison for a total of 20 years and 8 months. He timely appealed the trial court's order denying his motion for specific performance.

DISCUSSION

Montano filed his motion for specific performance under case number VA052851, the 1999 case. The People's opposition was also filed under the 1999 case number. The matter was heard under that number in conjunction with a hearing in case number VA136210, the 2015 case. Montano filed his appeal

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[2] Montano also pled no contest in case number VA139517 for possession of a shuriken in violation of section 22410. The trial court imposed a sentence of two years on that case, and ordered it to run concurrently with his sentence in case number VA136210.

under the 1999 case number. The judgment in case number VA052851, however, was entered on April 7, 1999, over 16 years prior to this October 9, 2015 appeal. It is well-established that the filing of a timely notice of appeal is a jurisdictional prerequisite. (*In re Chavez* (2003) 30 Cal.4th 643, 650.) Accordingly, we questioned whether the appeal was timely and what remedy was available to Montano if it was untimely.

The parties submitted letter briefs addressing this issue. The People argued Montano's appeal from a 1999 case was untimely and he was limited to filing a petition for writ of habeas corpus or a writ of error coram nobis. Montano urged us to liberally construe the notice to reflect the case number for the 2015 case since the notice correctly identified the 2015 order being appealed. We decline to dismiss the appeal and will treat it as one from case number VA136210, the 2015 case.

In reaching this conclusion, we find applicable the reasoning in *D'Avola v. Anderson* (1996) 47 Cal.App.4th 358, 361-362 (*D'Avola*). *D'Avola* presents substantially similar facts: the notice of appeal also contained the wrong case number, which related to a case between the same parties arising from the same facts which had been voluntarily dismissed. Despite the inaccuracy, the notice clearly identified the order from which the appeal was taken. The *D'Avola* court declined to dismiss the appeal. It found immaterial that the notice contained the wrong case number so long as it was " 'reasonably clear' " and the notice " 'states in substance' " the judgment or order that the appellant wished to challenge. (*Id.* at p. 362.) The court reasoned, "Although competent attorneys will ensure that the correct case number is affixed to the notice of appeal, there is *no* authority for

the proposition that an incorrect case number deprives an appellate court of jurisdiction." (*Ibid.*)

We likewise conclude the notice of appeal in this matter "states in substance" the order being challenged. Montano's notice of appeal clearly states he was appealing the September 24, 2015 order issued by the court. The People do not contend there was any confusion or mistake regarding which order Montano meant. Indeed, the People did not challenge Montano's appeal of a 1999 case and briefed the issues relating to the denial of the motion for specific enforcement. As a result, we adhere to "the law of this state that notices of appeal are to be liberally construed so as to protect the right of appeal if it is reasonably clear what appellant was trying to appeal from, and where the respondent could not possibly have been misled or prejudiced." (*Luz v. Lopes* (1960) 55 Cal.2d 54, 59.)

Having addressed this threshold jurisdictional issue, we now turn to the merits of Montano's appeal. Montano contends the parties agreed or, at a minimum, implicitly understood when he plead to the section 422 violation in 1999, that the conviction would never be used as a strike in a future case.[3] We find the record does not support a finding that the parties impliedly or expressly bargained for this provision.

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[3] In support of this contention, Montano cites to *Harris v. Superior Court* (2015) 242 Cal.App.4th 244 (*Harris*), which was later granted review by the California Supreme Court on February 24, 2016. Accordingly, it is citable only for its persuasive value. (See Cal. Rules of Court, rule 8.1115(e)(1).) We find the case distinguishable because in *Harris*, the People were deprived of an expressly stated benefit of the plea agreement. Here, as we discuss, there was no such express promise.

To reach our decision, we employ two standards of review. We review findings of law under a de novo standard and we consider whether substantial evidence supports the trial court's factual findings. (*People v. Holmes* (2004) 32 Cal.4th 432, 442.)

The California Supreme Court has held "a negotiated plea agreement is a form of contract and is interpreted according to general contract principles." (*Doe v. Harris* (2013) 57 Cal.4th 64, 69.) "[T]he general rule in California is that a plea agreement is ' "deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy. . . ." ' [Citation.] It follows, also as a general rule, that requiring the parties' compliance with changes in the law made retroactive to them does not violate the terms of the plea agreement, nor does the failure of a plea agreement to reference the possibility the law might change translate into an implied promise the defendant will be unaffected by a change in the statutory consequences attending his or her conviction. To that extent, then, the terms of the plea agreement can be affected by changes in the law." (*Id.* at pp. 73-74.)

Here, the plea agreement, signed by Montano, his trial counsel, and the deputy district attorney, promised the imposition of the mid-term of two years in state prison in exchange for a plea of no contest to the charge of criminal threats in the 1999 case. In the agreement, Montano "admitt[ed] the following offenses, prior convictions and special punishment allegations, carrying possible penalties as follows:" one count of a section 422 violation with a possible term of "16 [months], 2 [years], 3 [years]." The plea agreement did not include admissions of any "prior conviction or special punishment

allegations." It further specified the court will sentence him to "2 years forthwith."

Further, Montano left blank the section in the advisement and waiver form which allowed him to "offer to the court the following as the basis for [his] plea of no contest." He also initialed the provision showing he agreed "[t]hat it is absolutely necessary all plea agreements, promises of particular sentences or sentence recommendations be completely disclosed to the court on this form." The plea agreement, on its face, does not show the parties intended his conviction for criminal threats would never be used as a strike, even if the law changed on the subject. Thus, the consequences of the plea agreement were modified by enactment of Proposition 21.

Nevertheless, the California Supreme Court in *Doe v. Harris* explained, "it is not impossible the parties to a particular plea bargain might affirmatively agree or implicitly understand the consequences of a plea will remain fixed despite amendments to the relevant law. [Citations.] [¶] Whether such an understanding exists presents factual issues that generally require an analysis of the representations made and other circumstances specific to the individual case." (*Doe v. Harris, supra*, 57 Cal.4th at p. 71.)

Montano contends "[i]t is clear from the sequence of events that [the] impetus to appellant's agreement to plead no contest and sacrifice his liberty for two years was the promise of the state that it would not seek to use the case as an enhancement under the Three Strike[s] Law in the future." According to Montano, the parties achieved this goal by dismissing the deadly weapon allegation. Montano's own declaration states the district attorney promised "the conviction would not be used to enhance

any future sentences pursuant to the Three Strikes law. At the time of my plea, I was informed by my attorney that the District Attorney had proposed dismissing the personal use of a deadly weapon allegation as a way for me to avoid a second 'strike' conviction." In support, he provides a purported handwritten note by his defense counsel at the time of the plea that stated, "D.A. advised and offers [Defendant] 2 years w/o strike."

The note to which he refers obviously referenced Montano's first strike, the burglary conviction from 1992, and indicated it would not be used in the calculation of his sentence in the 1999 plea agreement. It did not mean that the section 422 conviction to which he plead in 1999 would never be used to enhance a future sentence. In 1999, the sentence for making a criminal threat was 16 months, two years, or three years. (§ 18.) If Montano's first strike was used to compute the sentence for the plea agreement, his sentence would have been "twice the term otherwise provided as punishment for the current felony conviction." (§ 1170.12, subd. (c)(1).) Thus, without the 1992 strike conviction being taken into consideration, the shortest possible sentence Montano could have received was the low base term of 16 months doubled, for an aggregate sentence of two years and eight months. It is apparent that the import of the notation was a reference to the 1999 sentencing agreement. Nothing in the record shows the parties intended "the consequences of a plea will remain fixed despite amendments to the relevant law." (*Doe v. Harris, supra*, 57 Cal.4th at p. 71.)

The trial court reached the same conclusion, finding "[no]thing in the record that shows that there was an implied agreement of any kind or that it could be read as that." We find substantial evidence supports the trial court's view.

DISPOSITION

The judgment is affirmed.

BIGELOW, P.J.

We concur:

RUBIN, J.

FLIER, J.